JOHN T. FEY, Clerk
OFFICE OF THE CLERK
SUPREME COURT, U. S.

No. 294 1

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

EUGENE A. TALIAFERRO

PETITIONER

VS.

HON. THOMAS COAKLEY JUDGE PRO TEM. OF THE SUPERIOR COURT FOR THE COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA AND DOROTHY TALIAFERRO aka FINN aka DAVIS REAL PARTY IN INTEREST

RESPONDENTS

33/20

PETITION FOR WRIT OF CERTIORARI

TO THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES THEREOF:

NOW COMES THE PETITIONER ABOVE NAMED AND PETITIONING THIS HONORABLE COURT FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS IN THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO RESPECTFULLY REPRESENTS AS FOLLOWS:

Petitioner requests the issuance of a Writ of Certiorari to review the decision of the District Court of Appeals of the State of California First Appellate District, Division two. The case carried number Civil 17123 in the Docket before the Appellate Court. The

Appellate Court decision is attached and affixed hereto in extenso as Exhibit A. The decision was handed down on March 5, 1956. A petition for a rehearing was filed which was denied on the 4th day of April 1956. Subsequently a petition for a hearing before the Supreme Court of the State of California was filed and denied on May 2nd 1956. The denial of a hearing on May 2nd 1956 was tantamount to a final decision by the highest court of the State of California.

THE GROUNDS UPON WHICH THE JUDGEMENT IS SOUGHT TO BE REVIEWED ARE AS FOLLOWS:

I

That Petitioner's rights, privileges and immunities under the Constitution of the United States have been infringed upon in that the decision and opinion of the Appellate Courts of the State of California have sanctioned and approved procedure of the Lower Court which lacked due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States. (28 U.S.C.A. Sec. 1257)

II

The Petitioner's rights, privileges and immunities under the Constitution of the United States have been infringed upon in that the decision and opinion of the Appellate Courts of the State of California have sanctioned and approved procedure of the Lower Court which has deprived Petitioner of the equal protection of the law as guaranteed by the Constitution of the United States. (28 U.S.C.A. Sec. 1257)

III

That the Appellate Courts of the State of California in this case have by their ruling sanctioned a departure from the usual courseof Judicial Procedure so as to require the Supervision of the High Court.

(Supreme Court Revised Rules April 12, 1954, Rule 19 Section 1 subdiv. (b).)

The provisions of 28 U.S.C.A. 1257 relied upon by Petitioner read as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as fàllows:"

Subdivision 3 is as fàllows:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The provisions of Rule 19 Sec. 1 subdiv. (b) of the Revised Rules of the Supreme Court read as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's descretion, indicate the character of reasons which will be considered:"

Subdivision (b) is as follows:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The Constitutional provision relied upon by Petitioner is Amendment XIV to the Constitution of the United States Section 1 which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Specifically in support of the foregoing grounds petitioner points to the following:

Petitioner is the defendant in the case of Taliaferro v. Taliaferro pending in the California State Superior Court in and for the County of Contra Costa #R-2346. The Superior Court is the County Court of general jurisdiction in the State of California. Said case was set for trial before the Honorable Thomas Coakley sitting Pro. Tem. on or about October 31, 1955. On October 24, 1955 Petitioner filed a statement for disqualification of Judge Coakley in a sworn affidavit under the provisions of the California Code of Civil Procedure Sec. 170 subdiv. 5 alleging facts showing a personal bias and prejudice on the part of said Judge Coakley against Petitioner. Judge Coakley denied being personally served with a copy of said statement of bias and prejudice but admitted receiving a photographed copy of the same prior to October 31, 1955 from the County Clerk's office in Contra Costa County. He also admitted having possession of the photographed copy of the affidavit of bias and prejudice at the opening of the trial on the 31st day of October 1955 and of having taken cognizance of said affidavit and ordering it stricken from the files. (Certified copy of Record page 33 lines 11 et. seq. contained in Judge Coakley's Answer to Petition for Writ of Prohibition.)

"Respondent alleges that petitioner's affidavit of Disqualification was <u>never presented</u> to respondent as required by C.C. P. Section 170 Subdiv. 5; that it was <u>filed</u> with the Clerk, who, acting on his own, and not at the request of the petitioner, photographed the affidavit and mailed it to the respondent; that upon calling the case for trial on October 31, 1955 respondent took cognizance of the affidavit and struck it from the files, stating his reasons therefor."

Respondent Judge Coakley did not within five days after receipt of

Petitioner's affidavit of bias and prejudice file any denial of the charges or counter affidavit as required by the California law under Section 170 Subdiv. 5 of the California Code of Civil Procedure. Petitioner's Petition alleged this fact which was not denied in any portion of the proceedings. In fact it was not denied that the Respondent Judge at no time filed an affidavit denying the charges presented to him in the court below. (See page 5 Certified copy of the Record line 25 to page 6 Cert. Copy of Record line 2 inclusive.) There the following statement appeared in Petitioner's Petition.

> "That upon the opening of said trial said Judge Coakley produced said affidavit attached as Exhibit A hereto and stated to affiant in substance and effect that he was ordering it stricken as being insufficient but did not within five days after the filing of petitioner's affidavit file a counter affidavit and has never filed such affidavit in this case."

The above statement contained in Petitioner's Petition for an Alternative Writ of Prohibition was not denied by the Respondent Judge. Not only that but the Respondent Judge admitted the central and main charges of Petitioner as to the existence of the bias and prejudice of said Judge. (See certified copy of Record page 31 lines 1 to 12 incl.)

> "Respondent acknowledges that he stated to petitioner in case Number 3205 that respondent believed petitioner had committed perjury; further acknowledges that in connection with R-1046 and other cases assigned respondent for trial in August, 1954, and with respect to which petitioner sought delays, respondent expressed the view that petitioner appeared to be abusing the processes of the Superior Court of Contra Costa County; and that the very large number of cases then pending in Contra Costa County in which petitioner was plaintiff or cross-complainant, particularly those between petitioner and his former wife, caused respondent to believe that petitioner was litigous; - - -"

The affidavit of bias and prejudice filed by Petitioner contained the following statements which were undenied by the filing of any counter affidavit on the part of the Respondent Judge Coakley.

Certified copy of Transcript page 10 lines 17 to 20 incl.

"; that nevertheless and notwithstanding said judge chose to believe representations made to the court with reference to affiant's conduct based upon the work of a self-confessed perjurer Richard Taliaferro"

Cert. copy of Trans. page 10 lines 23 to 25 incl.

"- - - Judge Coakley immediately became incensed and assumed an attitude of extreme hostility to and towards affiant;"

Cert. copy of Trans. page 11 lines 3 to 9 inclusive:

"That Judge Coakley then proceeded to excoriate and rebuke affiant upon the basis of the large number of cases in which affiant was involved without giving affiant any= opportunity to reply or explain and without taking into consideration the fact as to whether or not affiant might possibly have been completely justified in being a party to every litigated proceeding that said Judge had examined;"

The affiant continues referring to Judge Coakley's conduct in Contra Costa County case R-3264 a trial held prior to R-2346 the proceeding involved in this case. Cert. copy of Trans. page 12 lines 18 to 20 incl.

"that in this entire proceeding said Judge Coakley's attitude was angry, incensed, hostile, biased and unjudicial to and towards affiant;"

Also at Cert. copy of Trans. page 12 lines 24 to 26 incl. the following appears:

"; that at that time Judge Coakley told affiant that he thought of having affiant reported to the District Attorney for perjury;"

The time referred to was just prior to the trial of R-3264 in Contra Costa Superior Court. The affidavit further relates a thinly veiled charge of subornation of perjury made by Judge Coakley to and towards affiant the Petitioner in this matter. Cert. Copy of Trans. page 13 lines 13 to 17 incl.

"; that the clear intimation of said Judge's remarks were to the effect that said Von Kosa was affiant's creature who would testify at any time any place to anything affiant desired him to relate, all of which was untrue;"

At page 14 Cert. Copy of Trans. lines 14 to 17 incl. the following appeared in Petitioner's affidavit.

> "; that when affiant began his cross-examination of said daughter Jacqueline Judge Coakley became incensed and excoriated affiant from the bench and refused to listen to any explanation on the part of affiant - - -"

On the same page Cert. Copy of Trans. lines 22 to 26 incl. the following appears:

> "; that towards the close of the trial in R-3205 Judge Coakley remarked from the bench that he intended to examine the entire record of the case with a view to referring the matter to the District Attorney for prosecution for perjury;"

The affidavit of bias and prejudice filed by Petitioner also contained the following statement at page 15 Cert. Copy of Trans. lines 3 to 6 incl. referring to Judge Coakley:

> "; that he also stated to affiant that he had considered referring affiant's testimony in Bank of America vs. Taliaferro Case #60672 to the District Attorney for perjury;"

The affidavit then goes on referring to R-3205 Contra Costa Superior Court and Judge Coakley at Cert. Copy of Trans. page 15 lines 19 to page 16 line 1 incl.

> "; that in this entire proceeding said Judge Coakley has indicated to affiant that he has accumulated a bias, prejudice and hostility to and towards affiant based upon matters not proven or established by evidence in open court; for these reasons affiant states that a fair and impartial trial cannot be had before Judge Coakley on October 31, 1955 at 10 A.M. in the case of Taliaferro v. Taliaferro R-2346 or in any case involving affiant as a party litigant at any time or place."

The foregoing constitute the salient portions of Petitioner's affidavit of prejudice filed prior to the trial in case R-2346. As can be seen these portions of the affidavit set forth matters which clearly indicate that Judge Coakley had an exceedingly low and adverse opinion as to the character, integrity and truthfulness of affiant prior to the trial of R-2346 in which Petitioner was a party and principal material witness on his own behalf. This

affidavit as previously stated was admittedly in Judge Coakley's hands prior to the commencement of the trial in R-2346. Judge Coakley instead of calling in another Judge to try the issues of bias and prejudice pertaining to his disqualification struck the affidavit from the files and proceeded to try the case in R-2346. At no time in the entire proceedings evidenced by the Certified copy of the Record filed with this Petition was Petitioner ever accorded a hearing on the question of the bias and prejudice and disqualification of Judge Coakley. After a partial trial of the case in R-2346 the matter was recessed. During the recess Petitioner filed a Petition for an Alternative Writ of Prohibition ordering Judge Coakley to refrain from proceeding with the trial or to show cause at a given time and place why he should not do so. In support of his Petition for a Writ Petitioner relied upon the well established California Law that whenever the conduct of a Judge in a particular trial indicated that he had a personal bias and prejudice towards a litigant and particularly where that bias and prejudice involved a low or adverse opinion of the litigant's integrity and truthfulness such a Judge was disqualified from trying a subsequent case involving the same litigant if that litigant filed an affidavit of bias and prejudice prior to the commencement of the subsequent trial. In this connection Petitioner relied particularly upon the following California cases, among others:

Rosenfield v. Vosper 70 C.A. 2nd 217; 160 P. 2nd 842

Evans v. Superior Court 107 C.A. 372; 290 Pac. 662

Briggs v. Superior Court 215 Cal. 336; 10 Pac 2nd 53

Chastain v. Superior Court, 14 C.A. 2nd 97; 57 P. 2nd 982

Keating v. Superior Court 45 C 2nd 440; 289 P. 2nd 209 (Nov 1955

In Evans v. Superior Court 107 C.A. 372; 290 Pac. 662 it was said

at page 381 C.A.:

> "-----in the instant case, for, as it fully appears from the record herein, the trial judge will not only be called to pass upon the questions of law that may be presented to him in the cases, but he will nevertheless be called upon to pass upon the issues of fact, and the evidence upon these issues of fact will no doubt be conflicting. His conclusions upon the issues of fact may be determinative of the case. In other words, the judge will be in the position of a juror, as every trial judge is when hearing and trying a nonjury case where issues of fact are involved. He will be obliged to consider and weigh the evidence and the creditibility of the witnesses, and among these witnesses will be the petitioners herein. It is alleged in the petition, and it is not denied, that petitioners will give testimony which will be relevant, material and pertinent to their defenses."

and further on page 382 C.A. it is said:

> "In the instant case, therefore, after carefully considering the authorities heretofore given and applying the test last stated-which test we think fair, just, equitable and impartial-to the record as it is presented to us, can it be said as a matter of law that the trial judge is disqualified and that the petitioners would not be afforded a fair and impartial trial as contemplated by law? Briefly adverting to the record before us, we nowhere find a denial in the answer of the trial judge nor in his affidavit that he did not intend to say nor did not want to be understood as saying that the defendants had testified falsely, or that they were without veracity or integrity. He very frankly states "that any opinion he may have of them or either of them or their veracity is not derived from any other source than from the information and evidence introduced during the trial of the case of McLeod v. Evans." The opinion delivered by the respondent judge, which opinion contained several pungent trenchant and caustic comments to and concerning these petitioners, and which likened their course of conduct to al Morgan and a Kidd, was imparted with the utmost sincerity. The remarks in the decision were no doubt, prompted by the respondent judge's sense of justice and because of his firm belief that perjury had been committed by the petitioners in his court. And furthermore, we may well appreciate that there must have arisen in the breast of the trial judge a righteous indignation when he thought that petitioners had wilfully testified falsely. We have not the evidence before us. We must assume that the decision and opinion of Judge Tappaan, and every part thereof, is amply sustained by the evidence. On the other hand, is it fair and just to allow a judge who has such a definite positive, fixed and firm belief justifiable though it may be, concerning these petitioners the two defendants, who were regarded by him as pirates and falsifiers, to again pass upon the issues of fact in a case where the defendants will undoubtedly be material witnesses? Would a reasonable person hesitate as to whether or not the trial judge could, under the circumstances, considering the weaknesses of human nature, entirely ignore such facts-the belief that the petitioners had committed perjury? Can the judge ignore his opinion and belief,

though honest it may be, that these petitioners have wilfully testified falsely? We think not. "Is it made to appear probable that, by reason of bias or prejudice of such judge ....a fair and impartial trial cannot be had before him? (Code Civ. Proc. sec. 170 as amended.) We think it has. Furthermore it would be unfair to ask a judge, under these circumstances, to again try issues of fact involving the honor, integrity and veracity of men whom he had so recently condemned and denounced."

"Assuming that the trial judge was correct in his fierce discommendation of petitioners, they nevertheless are entitled to go before a judge of another department of the court, one who will assume that they are telling the truth until the contrary has been shown and where no attaint of perjury will follow them. There they may present their defense, if any they have, to a judge who has not a fixed or settled opinion of their integrity or veracity."
(underlining represents italics by court)

In Briggs v. Superior Court 215 Cal. 336; 10 Pac. 2nd 53 the California Supreme Court sitting en banc upheld the Evans case citing it with approval in a similar case where the Judge about to try a cause had expressed himself as to the lack of veracity of some of the parties involved and had openly accused them of stating falsehoods in an affidavit and held said Judge to be unquestionably biased and prejudiced against the parties involved and therefore disqualified and held that a Writ of Prohibition would lie. Chastain v. Superior Ct. 14 C.A. 2nd 97; 57 P. 2nd 982 followed both the Evans case and the Briggs case. The court quoted with approval the language of the Briggs case. There the Court stated on page 102 of its opinion in the Chastain case:

"When the trial judge acts as the trier of both the facts and the law his qualifications, so far as bias and prejudice are concerned, are somewhat the same as the qualifications of a juror. No one would doubt that if a juror stated that he was of the opinion that one of the parties to the action was not only capable of being but had, to his knowledge, been guilty of making false statements under oath, such juror would and should be disqualified, even if that juror stated that he could give the parties a fair trial (Quill v. Southern Pac. Co., 140 Cal. 268; 73 Pac. 991)"

and further on page 104 the court said:

"When there is uncontradicted evidence that the trial judge

entertains a fixed opinion that a party to an action has deliberately perjured himself upon a material issue or that he is unworthy of belief, and frankly admits he possesses that frame of mind, the law entitles the litigant to the privilege of a trial before some other judge. Under such circumstances the question regarding the existence of bias or disqualification becomes one of law."

There is no doubt that the remedy of Appeal has been regarded by our higher courts as being inadequate in cases such as the present case. This rule is expressed and explained in Evans v. Superior Court 107 C.A. 372; 290 P. 662 at page 384 and 385. There it was said:

"It is said by the Supreme Court in Hall v. Superior Court supra; "It is insisted, however, that the petitioner has other remedies, i.e. by appeal, and that therefore the writ should not issue. This argument is not well taken. In the case of Lindsay-Strathmore Irr. District v. Superior Court, supra, the writ was granted, although the same result could have been achieved by taking an appeal. In Quatman v. Superior Court 64 Cal. App. 203; 221 Pac. 666, the same objection was raised as in the instant case and in answer thereto the court said: 'Where a judge is disqualified to act in any proceeding or cause the disability necessarily enters into all orders and decisions made by him other than those specially excepted and provided for in the codes, and to refuse the writ on the ground that a remedy might be had in another manner would be to permit the trial to proceed to a final conclusion by the disqualified judge and then set aside the proceedings as void ab initio.' No good purpose could be served in permitting a disqualified judge to perform certain acts and thereafter declare them void on the ground that he had no jurisdiction to perform the same." This rule finds support not only in the decisions of our state but in those from other states. (citing cases)

There is no doubt that the filing of an affidavit sufficient in substance on the question of bias and prejudice suspends all further proceeding except the determination of that challenge. Where the facts are not denied or no answering affidavit is filed the question presented to the Appellate Court is purely one of law and if the affidavit of prejudice is sufficient on its face the Writ of Prohibition should be issued.

See Turkington v. Municipal Court 85 C.A. 2nd 631; 193 P. 2nd 795 at page 638 C.A. 2nd. The court said referring to the filing of

an affidavit of prejudice under Subdivision 5 Sec. 170 C.C.P.

> "When such a statement is filed it is then provided that the challenged judge is deprived of power to pass on the question of his own qualifications, and that such question shall be passed upon by another judge, Of course, until such question is decided, the challenged judge is without jurisdiction to proceed.

and further on 639 C.A. 2nd.

> As already noted, the section provides that no judge shall act in any action or proceeding when it is made toappear probable that a fair and impartial trial cannot be had before him, and then the section allows any party to file the required statement. It is not difficult to spell out of such language a purpose to disqualify the judge from presiding over the proceeding once the showing of disqualification is made by anyone having the right to raise the issue, i.e., by any party."

In McKay v. Superior Court 98 C.A. 2nd 770; 220 P. 2nd 945 it was said at page 776 C.A. 2nd:

> "From a reading of the two sections above cited it is readily apparent that the Legislature has determined that when it appears <u>probable</u> from a proper challenge that by reason of bias or prejudice of a judge, before whom the matter is pending, a fair and impartial trial cannot be had, without further proof or act another judge shall be assigned to hear the challenge. Stated otherwise, when sufficient facts appear from the affidavit of bias the challenged judge is precluded from passing upon the question of his alleged bias or prejudice. That this is a proper interpretation of the statutes in question is self-evident, since if this were not true and the judge so challenged were allowed to conclusively determine his own state of mind the efficacy of the section (170.5) as written would be defeated." (Briggs v. Superior Court 215 Cal. 336; 10 P. 2nd 53; Kreling v. Superior Court, 63 Cal. App. 2nd 353; 146 P. 2nd 935)
> (Underlining represents italics by the court)

Further on page 777 of theopinion the court said:

> "Necessarily, therefore, where, as here, the facts alleged in support of the challenge are not denied but only the bias or prejudice alleged the question presented is solely one of law and properly determinable by this court in this proceeding."

It is respectfully submitted that the affidavit submitted by petitioner herein contained averments of fact which as a matter of law showed bias and prejudice on the part of the trial judge. Those

facts were at no time denied by answering affidavit. It was Petitioner's contention that Keating v. Superior Court supra (Nov 1955) was particularly applicable and directly controlling as an authority which the District Court of Appeals was bound to follow in granting Petitioner's application for an Alternative Writ of Mandate. The District Court of Appeals as previously stated on March 5, 1956 denied Petitioner's application for an Alternative Writ of Mandate without hearing, opinion or comment. Thereafter Petitioner filed a Petition for Rehearing before the District Court of Appeals and in it he raised the Federal question involved here. The language used by Petitioner in raising the Federal question appears at page 94 Cert. Copy of Trans. lines 17 to 25 inclusive as follows:

> "It is Petitioner's contention among other things that it is one of the essential elements of due process that his cause be heard by an unbiased Judge. Where as here the uncontradicted state of the record as it appeared to the District Court of Appeals showed the existence of bias and prejudice on the part of the trial Judge and that the objection was timely raised denial of relief to Petitioner was violative of his rights under the Fourteenth Amendment to the Constitution of the United States."

Petitioner's Petition for a Rehearing was denied by the California District Court of Appeals April 4, 1956. Petitioner thereupon Petitioned the Supreme Court of the State of California for "Hearing and Transfer of Cause" before it. This Petition specifically raised the Federal question a number of times. In his statement of Questions of Law Involved Petitioner included the following at page 102 Cert. Copy of Trans. lines 5 to 15 incl.

> "3. Did not the Appellate Court, by failing to apply for the benefit of Petitioner the established law of this State governing the matters in issue here, deny Petitioner his rights under the Fourteenth Amendment to the Constitution of the United States?"
> 4. Did not the Appellate Court, by its denial of the Petition for an Alternative Writ of Prohibition in effect, compel Petitioner to have his case tried by a Judge who so far as the official record was concerned was biased and prejudiced

and thereby deprive Petitioner of his rights under the Fourteenth Amendment to the Constitution of the United States?"

Further in Petitioner's "Petition for Hearing and Transfer of Cause" the presence of the Federal question is further elaborated upon. At page 111 of the Certified Transcript line 12 to page 112 line 6 inclusive the following statement appears:

> "It is Petitioner's contention among other things that it is one of the essential elements of due process that his cause be heard by an unbiased Judge. Where as here the uncontradicted state of the record as it appeared to the District Court of Appeals showed the existence of bias and prejudice on the part of the trial Judge and that that objection was timely raised denial of relief to Petitioner was violative of his rights under the Fourteenth Amendment to the Constitution of the United States.
> It is further Petitioner's contention that an unbroken line of California decisions clearly establish it to be the law of this state that allegations of the kind and character relied upon by Petitioner in his affidavit of bias and prejudice are sufficient to disqualify a trial Judge and that where that trial Judge does not timely deny the truth of such allegations there is no question of fact to be determined prior to the issuance of an Alternative Writ of Prohibition and that to ignore the established law of the State of Petitioner's residence or to fail or refuse to apply it on Petitioner's behalf is to deny him his rights under the Fourteenth Amendment to the Constitution of the United States."

The foregoing constitutes the manner in which Petitioner raised the Federal question pertaining to his Constitutional rights in the California State Courts. The Petition for Hearing was denied by the California State Supreme Court as pointed out previously on May 2, 1956.

It is Petitioner's contention that the refusal of the California District Court of Appeals to issue an Alternative Writ of Prohibition compels Petitioner to have his case tried before a Judge who so far as the record presented to the Appellate Court is concerned was admittedly biased. The affidavit filed by Petitioner before the opening of the trial unquestionably contained allegations showing bias and prejudice. Particularly it referred to

statements of Judge Coakley clearly indicating that he did not believe Petitioner to be a truthful man. Judge Coakley did not follow the regular procedure provided by the California Code of Civil Procedure Sec. 170 Subdiv (5) and file a counter affidavit andcall in another Judge to hear the question of disqualification. Instead he arbitrarily struck the affidavit from the record and proceeded to try the case. Under all of the California cases cited the only question in such a case is whether or not as a matter of law the averments of the affidavit show what amounts to legal grounds for disqualification. The trial Judge having failed to file a counter affidavit and having refused to call a hearing as provided for by law to determine the question of disqualification has no right upon an application for Writ of Prohibition to the Appellate Court to deny the truth of the averment of the affidavit. The only question that the Appellate Court had a right to consider under all of the California cases cited hereinabove was the question as to whether or not the affidavit filed contained averments which as a matter of law were a proper ground for disqualification. The trial Judge had had his opportunity to raise factual issues and accord Petitioner a hearing on these issues but he refused to do so. Then when Petitioner asked for a Writ of Prohibition the trial Judge endeavored to raise factual issues by denying that he was at any time angry, hostile, or unjudicial in his attitude toward Petitioner in the trial of cases R-3205 and R-3264 which preceeded the case R-2346 in which this present controversy arose. He also claimed certain conciliatory remarks were made by Petitioner which showed a waiver of the bias , prejudice, and hostility which Petitioner was convinced the trial Judge felt towards him. These matters were set forth in an answer filed in opposition to Petitioner's Petition for Writ of Prohibition. If the Appellate

Court considered these matters in denying the Writ it had no right to do so without giving Petitioner an opportunity to reply or explain matters which were allegedly stated at the time of trial, were quoted out of context, and contained no citation of line and page in the transcript to indicate their authenticity. If the Appellate Court of California correctly followed the law of its own State it had but to look at the unopposed affidavit of Petitioner and determine whether or not as a matter of law it was sufficient to show the disqualification of the trial Judge. It is Petitioner's contention that under the California Law it clearly was. We have then in this case a situation where Petitioner convinced that the trial Judge considers him untruthful and unworthy of credence as well as having developed a personal bias and prejudice towards him has set forth these facts in an affidavit filed and in the biased Judge's hands prior to the opening of the trial. The trial Judge then abritrarily ignores the statutory machinery of the law and proceeds with the trial of the case. The trial Judge furthermore does not deny the contents of the affidavit of bias and prejudice but strikes it as insufficient. The Appellate Court then denies relief. The Petitioner then has no recourse but to allow himself to be tried by a Judge who has not even denied his bias and prejudice. The California Courts then by their action in this case culminating with the denial of Petitioner's Petition for Hearing by the State Supreme Court are in effect compelling Petitioner to be tried by a biased, prejudiced and hostile Judge. Furthermore at no time in the entire proceedings as evidenced by the record in this case has Petitioner ever been given a hearing on the question of the disqualifications of Judge Coakley notwithstanding the clear provisions of the California Law providing for such a hearing. Petitioner contends that all of this clearly shows

a denial of due process which ought to be rectified by this Court. The United States Supreme Court enunciated the principle that trial by a biased judge was trial without due process in Tumey v. State of Ohio 273 U.S. 510; 47 S. Ct. 437; 71 L 'Ed 749; 50 A.L.R. 1243. The court in that case said at page 535 U.S.:

> "No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge - - - ".

The Court in Tumey v. Ohio dealt with the pecuniary interest of the Judge in the outcome of the case but in Adams v. Slavin 7 S.W. 2nd 836; 225 Ky. 135 it was made clear that there is no basis for differentiating between any of the cases where the bias was based upon the monetary interest of the judge or a personal bias and prejudice of the judge. It is the question as to the existence of the bias which is important not the elements which constitute the foundation of the bias. Adams v. Slavin makes it clear that no distinction should be made in any of the cases upon the basis as to whether or not the bias of a judge springs from a personal feeling towards a defendant or from the judge's monetary interest in the outcome of the case. There at page 838 S.W. 2nd it is said:

> "Even the right to be tried by a judge free from bias and prejudice may be waived by a failure to "seasonably object." Hargis v. Commonwealth 135 Ky. 578; 123 S.W. 239. There is no just distinction between the last state of case and a case where one fails to seasonably object to being tried by a judge who is disqualified because of financial interest in the prosecution. Indeed, the motive for a corrupt decision would often be more powerful in the first state of case than the latter, for the small financial return which accrues in the great majority of convictions in these misdemeanor cases would not have nearly the impelling force to a corrupt decision that a strong and personal bias or prejudice would have."

The reason for the disqualification of a judge would therefore appear to have no bearing on the question as to the existence of lack of due process where a defendant is tried by a biased judge

no matter what the foundation of the bias might be. The only question would appear to be as pointed out in the Slavin case as to whether or not the disqualification of the judge was waived or forfeited by failure to object. In Wagers v. Sizemore 222 Ky. 306; 300 S.W. 918 (1927) where the defendant filed an affidavit prior to trial claiming that he could not have a fair trial before the judge presiding over the court in question on the ground of the bias, prejudice, and pecuniary interest of the trial judge and said trial judge went ahead and tried the case notwithstanding the presence of the affidavit of disqualification as part of the record prior to time of trial, it was held that a trial of the case under those circumstances would constitute a deprivation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States. In Pinkleton v. Lueke 265 Ky 84; 95 S.W. 2nd 1103 it was held that where a magistrate was threatening to try a case on its merits notwithstanding the filing of an objection based upon the judge's bias and prejudice and interest in the outcome a trial under such circumstances would be a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States and defendant was entitled to a Writ of Prohibition to prevent the magistrate from proceeding. The case of Moore v. State 118 Ohio State 487; 161 N.E. 532 (1928) makes it uncontrovertibly clear that a trial by a judge who is disqualified upon any ground is a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States. In Moore v. State it was said at page 532 N.E.:

> "Not being advised by the record as to what the judge may have said, it will be assumed that he said exactly what was stated in the defendant's affidavit. However grossly the judge may have been misrepresented, he did not see fit to challenge the correctness of the affidavit, and no justification is apparent for refusing the defendant opportunity to offer further testimony upon the same issue.

> In the case of Tumey v. State 273 U.S. 510; 47 S. Ct. 437, 71 L 'Ed. 749, 50 A.L.R. 1243, the Supreme Court of the United States for the first time declared that the disqualification of a judge constituted a violation of the due process clause of the Fourteenth Federal Amendment. That case was based solely on the question of the interest of the trial judge in the outcome of the cause, but it would be a very narrow interpretation of that opinion to hold that any other serious disqualification did not equally constitute a bar to a judge hearing and deciding a cause. The spirit of that decision is that any litigant is entitled to have his case heard and decided by an impartial tribunal."

The court thereupon held that the action of the trial court in proceeding totry the case without first having a hearing determining the question as to the claimed bias and prejudice of the trial judge was a violation of the defendant's rights under the Fourteenth Amendment to the Constitution of the United States. To the same effect see Wolf v. Marshall 165 N.E. 848; 120 Ohio St. 216 and Montalto v. State 51 Ohio App. 6; 199 N.E. 198. In Sacher v. United States (1951) 343 U.S. 1. 96 L E 717; 72 S C 451. Justice Black in a dissenting opinion stated at page 17 U.S.:

> "No man should be forced to trial before a judge who has previously publicly attacked his personal honor and integrity. The risk to impartial justice is too great."

Furthermore in In re Murchison 349 U.S. 133. 99 L.E. 942; 75 S.C. 623, it was said at page 136 U.S.:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

In National Labor Relations Board v. Phelps 136 Fed. 2nd 562 at 563 it was said:

> "- - - for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process ---".

and further on the same page:

> "Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the

proceedings, and no judgment based upon them may stand."

In Lee v. Fleming 158 Fed 2nd 984 it was said at pages 987 and 988:

"For such action would not only appear to involve the usurpation of judicial power which is vested in the courts alone, but would also clearly be at war with the fundamental concept of due process of law that parties to controversies are entitled to have them determined by an impartial tribunal." (Underlining Petitioner's)

The California Supreme Court recognized these principles in In re Wallace 24 C 2nd 933; 152 P 2nd 1; where it says at page 938 C 2nd:

"Impartiality in a judge or juror is indispensable to a fair trial (Tumey v. Ohio 273 U.S. 510, 530; 47 S.Ct. 437, 71 L'Ed 749; Baker v. Hudspeth 129 F. 2nd 779.)"

In the case of"The Reno" 61 F 2nd 966 it was said at page 968:

"The necessary factors in a fair trial are an adequate hearing and an impartial tribunal, free from any interest, bias, or prejudice. Tumey v. Ohio 273 U.S. 510; Ott v. Bd. of Registration in Medicine, 276 Mass. 566, 177 N.E. 542."

In Inland Steel Co. v. National Labor Relations Board 109 F 2nd 9 it was said at page 20 of the opinion:

"That a trial by a biased judge is not in conformity with due process is sustained by the authorities. In Tumey v. Ohio 273 U.S. 510, 535, 47 S. Ct. 437, 445, 71 L'Ed. 749, 50 A.L.R. 1243, the court said: "- - - No matter what the evidence was against him, he had the right to have an impartial judge - - -"

In National Labor Relations Board v. Ford Motor Co. 114 Fed. 2nd 905 it was said at page 909:

"We may accept as fundamental, the axiom that a trial by a biased judge is not in conformity with due process of law." (Citing cases.)

In Whitaker v. McLean 118 Fed. 2nd 596 it is said at page 596:

"But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial."

In Payne v. Lee 24 N.W. 2nd 259; 222 Minn. 269 at page 263 N.W. 2nd it was said:

"The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is also in violation of the due process clause of U.S. Const. Amend. XIV. Buck v. Bell, 143 Va. 310, 130 S.E. 516, 51 A.L.R. 855; Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185. In the latter case the Iowa supreme court said (187 Iowa 1352, 175 N.W. 776): "The

constitutional guarantees recognize as a primal necessity that there be laws providing impartial tribunals for the adjudication of rights." See 3 Willoughby, Constitution of the United States, 2nd Ed. Sec. 1124; 12 Am. Jur. Constitutional Law. Sec. 635."

In State ex rel McFerran v. Justice Court. 202 P. 2nd 927; 32 Wash. 2nd 544, at page 929 P. 2nd the court says:

"We are also of the opinion that it is fundamental that a trial before a biased and prejudiced judge would constitute a denial of due process under the Fourteenth Amendment to the Federal constitution and Art. 1 Sec. 3, of our State constitution."

In Ponder v. Davis 65 S.E. 2nd 356; 233 N.C. 699 it was said at page 359 S.E. 2nd:

"Aside from the statute, however, 'Every litigant, including the state in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge'. State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 331, 332; 15 R.C.L. 539; 30 Am. Jur. 776 and 778. A fair jury in jury cases and an impartial judge in all cases are prime requisites of due process."

It is respectfully submitted that the record presented to the California District Court showed without contradiction that Respondent Judge Coakley had shown himself to be possessed of bias, prejudice and hostility to and towards Petitioner prior to the commencement of the trial of R-2346 on October 31, 1955. The record further showed that these matters were properly made the basis of an objection by Petitioner to the conduct of the trial of said cause R-2346 by Judge Coakley through the filing of an affidavit of bias and prejudice which was in Judge Coakley's hands prior to the commencement of the trial of that action. It also showed that Judge Coakley failed, refused, and neglected to disqualify himself or to have the matter of his disqualification heard under the provisions of the California Law C.C.P. Sec. 170 subdiv (5) but arbitrarily proceeded with the trial without filing any counter affidavit or written statement as provided for in said Section C.C.P. 170 subdiv. 5. The record of this entire

matter positively shows that Petitioner has never had a hearing upon the question of disqualification of Judge Coakley but on the contrary the denial of his Petition for Alternative Writ of Prohibition without hearing or comment now compels him to proceed to trial before the Respondent Judge who is undeniably biased and prejudiced as far as the official record is concerned. Petitioner contends that this action of the California District Court of Appeals in 17123 upheld by the State Supreme Court which has denied Petitioner a hearing on the question of bias and prejudice of the trial Judge and which has the effect of compelling Petitioner to be tried by a biased and prejudiced Judge is violative of Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States and should be examined into by this Honorable Court.

Eugene A. Taliaferro

EUGENE A. TALIAFERRO

EXHIBIT A

District Court of Appeal of the State of California

IN AND FOR THE

First Appellate District (E N D O R S E D)

Division Two

F I L E D
MAR 5 1956
WALTER S. CHISHOLM, Clerk
By L.R.E. Deputy

No. 17123

EUGENE A. TALIAFERRO,
Petitioner,

vs.

HON. THOMAS COAKLEY, JUDGE PRO TEM OF THE SUPERIOR COURT FOR THE COUNTY OF CONTRA COSTA,
Respondent.

BY THE COURT:

The petition for an alternative writ of prohibition filed in the above entitled cause is denied.

Dated March 5, 1956

/s/ NOURSE P.J.

No. 294

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

EUGENE A. TALIAFERRO PETITIONER VS. HON. THOMAS COAKLEY JUDGE PRO TEM. OF THE SUPERIOR COURT FOR THE COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA AND DOROTHY TALIAFERRO aka FINN aka DAVIS REAL PARTY IN INTEREST RESPONDENTS	MOTION FOR LEAVE TO FILE TYPEWRITTEN COPIES OF TRANSCRIPT OF RECORD AND PETITION FOR WRIT OF CERTIORARI

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES AND TO WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE ASSIGNED TO HEAR EX PARTE MOTIONS FROM THE NINTH FEDERAL JUDICIAL CIRCUIT

Petitioner hereby moves the above entitled Court for leave to dispense with the printing of the transcript of the record before the District Court of Appeals in the State of California involved in this case and the printing of his Petition for a Writ of Certiorari in the above and respectfully requests permission to file a certified original typewritten copy of the transcript of the record before said District Court of Appeals as well as ten original typewritten copies of his petition for a Writ of Certiorari.

This motion is based upon the ground that at the present time Petitioner cannot afford to defray the expense of the printing

STATE OF CALIFORNIA
SS.
COUNTY OF CONTRA COSTA

EUGENE A. TALIAFERRO being first duly sworn deposes and says: that he is the Petitioner named in the Petition for a Writ of Certiorari presented in the foregoing entitled action and the moving party in the Motion attached hereto; that at the present time he is unable to defray the expense of printing the transcript of the record and the Petition for a Writ of Certiorari presented in this matter; that the reason for his inability is because of the present necessity of making monthly payments on delinquent Federal and County Taxes and loans all of which have left Petitioner with an insufficient amount of available cash for the purpose of defraying the cost of printing as aforesaid.

Eugene A. Taliaferro

Subscribed and sworn to before me
this 28 day of _____ July 1956

John E. Truman (Seal.)

Notary Public in and for the County of
Contra Costa, State of California

My Commission Expires Oct. 3, 1958

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 294

EUGENE A. TALIAFERRO,
Petitioner,

vs.

HON. THOMAS COAKLEY, Judge Pro Tem of the Superior Court for the County of Contra Costa, State of California, and DOROTHY TALIAFERRO aka FINN aka DAVIS, real party in interest,
Respondents.

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI.

THE MERITS OF THIS ACTION WERE CONSIDERED BY THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA.

The petitioner seeks to present to the Honorable Supreme Court of the United States essentially two

issues. The issues are somewhat confused in the petition and have been somewhat confused in the proceedings leading up to this stage of the proceeding. Basically and essentially, they are as follows:

1. That Thomas Coakley, Superior Judge of Mariposa County, assigned by the Judicial Council of the State of California to Contra Costa County for the purpose of trying an action titled "Taliaferro v. Taliaferro", was, in fact, biased and prejudiced against the petitioner, Eugene A. Taliaferro.

2. The other issue is whether the procedures set up by the Legislature of the State of California for considering Issue No. 1 were properly followed.

We respectfully submit that Issue No. 1, outlined above, is not here involved. Issue No. 2 has been decided adversely to petitioner by the State Court and does not present a Federal question.

THE QUESTION OF ACTUAL BIAS WAS PRESENTED TO THE STATE COURT.

The petitioner for certiorari here contends that no counter-affidavit was filed and that, therefore, his affidavit is uncontradicted and must be treated as true. This office does not have access to a certified copy of the record presented to your Honorable Court and, therefore, cannot cite by reference to page in the record. But we respectfully call the attention of the

Court to "Return by Way of Answer to Petition for Writ of Prohibition", filed with the District Court of Appeal, which was verified by the Honorable Thomas Coakley, Superior Judge. Whether or not the procedure for the consideration of these issues was correctly pursued according to the California Statutes, is a matter of State Law. So far as any Federal question is concerned, it is enough if the issue was actually decided by an independent tribunal. Errors of state procedure do not raise a Federal question. The issue of actual prejudice has been decided adversely to the petitioner, even though under the state procedure he was not entitled to present it in that form.

THE PETITIONER HAS NOT PROPERLY PRESERVED A FEDERAL QUESTION.

28 U. S. Code, Annotated, Section 1257, Subdivision 3, provides for Writ of Certiorari "where any title, right, privilege or immunity is *specially* set up for claim under the Constitution . . ." The record does not disclose that the petitioner specially set up a claim of Federal privilege at the trial Court. The petitioner acknowledges in his petition (page 13, beginning at line 11) that the first time he raised a Federal question was on petition for rehearing before the District Court of Appeal. We submit that this case is governed by *Edelman v. California* (1952), 344 U.S. 357, 73 Sup. Ct. Rpt. 293, 97 L.Ed. 387.

CONCLUSION.

This case was decided by the California Courts on the basis of the petitioner's failure to comply with California procedure. This does not raise a Federal question. A Federal issue was first sought to be raised upon a Petition for Rehearing before the District Court of Appeal of the State of California. The Federal issue he seeks to have presented not having been raised in the trial Court, it, therefore, does not come within 28 U.S.C.A. 1257(3), being a "title, right, privilege or immunity specially set up for claim under the Constitution". The allegations of bias and prejudice against the assigned judge were traversed by a certified Return to Petition for Writ of Prohibition in the District Court of Appeal and, presumably, passed upon by the Court.

No good ground exists for certiorari in the United States Supreme Court. The petitioner appears to be seeking to pick or choose a trial judge to his own liking by filing an Affidavit of Prejudice against any judge assigned to try one of his cases who happens to disagree with him. It is expensive to the County of Contra Costa to send away considerable distances for judges to try the petitioner's cases because he seeks to abuse the privileges of the *Code of Civil Procedure,* Section 170, of the State of California. Petitioner has insisted upon disqualifying all of the trial judges in Contra Costa County and if he continues to disqualify judges, there will soon be no Superior Judge in the State who is to his liking. It is important that the Superior Court in Contra Costa County

be able to clear its docket by having cases tried. If a litigant who files law suits (in pro per) by the score can summarily disqualify any judge who happens to rule against him, it will be impossible to keep the processes of the orderly administration of justice functioning.

Dated, Martinez, California,
October 5, 1956.

Respectfully submitted,

FRANCIS W. COLLINS,
District Attorney of the County of Contra Costa,
By MATTHEW S. WALKER,
Deputy District Attorney of the County of Contra Costa,
Attorneys for Respondent.

JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

EUGENE A. TALIAFERRO,

Petitioner,

vs.

No. 294

HON. THOMAS COAKLEY, Judge Pro Tem of the Superior Court for the County of Contra Costa, State of California, and DOROTHY TALIAFERRO aka FINN aka DAVIS, real party in interest,

Respondents.

PETITIONER'S ANSWER TO RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

EUGENE A. TALIAFERRO
PETITIONER IN PRO PER
1949 Pullman Street
San Pablo, California
BEacon 3-0255

PETITIONER'S ANSWER TO RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

I

RESPONDENT'S BRIEF IN REPLY TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI SETS FORTH NO VALID REASONS FOR A DENIAL OF THE WRIT.

Respondent's Reply to the Petition for a Writ of Certiorari filed herein is a composite of misstatements of the issues, the law and the facts pertaining to this matter. To begin with Respondent sets forth what he calls the two issues involved in this case. It is obvious from the language of the so called issues as drafted by Respondent that no Federal or Constitutional questions could be involved in those issues. It is equally obvious that they are not the issues raised by this Petition for a Writ of Certiorari filed in this proceeding. There is only one issue raised by that Petition. That issues is "Can the Courts of any given State by ignoring their own statubory procedure and decided cases compel a litigant to proceed to trial before a biased and prejudiced Judge without violating that litigant's rights under the Fourteenth Amendment to the Federal Constitution?" It will be seen from an examination of the statutes and the authorities cited in Petitioner's Petition for the Writ that he carefully and properly followed the California Law. When the Respondent Judge struck Petitioner's affidavit of bias and prejudice from the records of the trial court prior to proceeding with the trial of the case, his action raised out one issue, "Did the affidavit of bias and prejudice filed by Petitioner state sufficient facts to establish as a matter of law the bias and prejudice of the trial Judge?" Petitioner claims that it did. That position of Petitioner is abundantly supported by the authorities cited in his

petition for Writ of Certiorari. The proper remedy to test this question under the California Law was by application for a Writ of Prohibition to the District Court of Appeals to prevent the biased trial Judge from proceeding with the trial. Under the facts of this case, the Appellate tribunal was confined to a determination of the question as to whether or not the facts set forth in Petitioner's affidavit of bias and prejudice did show disqualification of the trial Judge as a matter of law. Under an unbroken line of California Authorities the Appellate Court in this matter had no right to consider the question of bias and prejudice as a controverted factual question. Yet respondent says they did. If they did so they acted in violation of the laws of their own state. If they decided the question of bias and prejudice adversely to Petitioner on the strength of Judge Coakley's answer to the Writ of Prohibition they did so illegally. Sec. 170(5) of the Code of Civil Procedure prescribes a most adequate and under the California Law the exclusive method for the trial Judge to raise all factual questions bearing upon the issue as to his bias and prejudice and gives a comprehensive means for trying and determining that issue. If the trial Judge ignores that method given him by Sec. 170(5) C. C. P. and fails to file a counter affidavit denying any charges of bias or setting up other factual issues, he cannot thereafter in opposition to an application for a Writ of Prohibition to the District Court of Appeals rest his case upon a dispute as to the facts involved. The question thereafter becomes one purely of law. The affidavit of bias and prejudice filed before him which he has ignored must be deemed true for all purposes in connection with the application for a Writ of Prohibition filed before the Appellate Court. If then the Appellate Court did, as Respondent says they did, determine the factual issues of "actual prejudice" against

Petitioner they acted wrongfully under the California Law. The cases cited by Petitioner in his Petition in this proceeding clearly establish that. If the Appellate Court upon a reading of Petitioner's affidavit of bias and prejudice filed in the trial court decided that as a matter of law it was insufficient to disqualify the trial Judge it was equally wrong. The substance of the affidavit filed by Petitioner herein before the Respondent Judge was clearly sufficient under the California Law to disqualify him. The cases cited in Petitioner's Petition for the Writ herein fully established that point. The District Court of Appeals of the State of California then has by a denial of Petitioner's application for a Writ of Prohibition wrongfully denied him relief to which he was entitled under the California Law. Up to this point Petitioner had no cause to complain of a violation of his Constitutional rights under the Federal Constitution. Not until the California Appellate Court denied Petitioner's Petition for a Writ of Prohibition did the California Courts say in effect to Petitioner that he was to be compelled to try his case before a trial Judge who had not denied his adverse opinion of Petitioner's truthfulness and integrity but in fact had admitted it in his answer filed in opposition to Petitioner's application for a Writ of Prohibition in the Appellate Court. It was not until then that Petitioner knew that the California State Courts were by their action proceeding to compel Petitioner to have his case tried by a biased and prejudiced Judge. It was not until then that the California Courts acted in violation of Petitioner's rights under the Fourteenth Amendment to the Federal Constitution. Consequently Petitioner seasonably raised the Federal question pertaining to his rights under the Fourteenth Amendment to the United States Constitution in the State Courts when he set forth

his claim of right in a Petition for a rehearing before the District Court of Appeals of the State of California and pursued his claim from there on to the California State Supreme Court where he was met by an adverse ruling.

> Muhlker vs. Harlem Railroad Co. 197 U.S. 544; 25 Sup. Ct. 422; 49 L'Ed, 872.

A Federal question may arise for the first time in a proceeding where the State Courts by the wrongful administration of the written law of the State violate a litigant's rights under the Fourteenth Amendment to the Constitution. See Myles Salt Co. vs. Iberia Drainage Dist. 239 U.S. 478; 36 Sup. Ct. 204; 60 L'Ed. 392. There it was said at page 484 U. S. :

> "And such decision, it is further contended, was a decision upon the state law and presents no Federal question, the statute of the State not being attacked.
>
> We cannot concur in the contention. It is true the law of the State as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question."

In Sullivan vs. Texas 207 U. S. 416; it was held that a constitutional question presented for the first time in a Petition for a Rehearing before the Court of Civil Appeals which was denied was timely, where the State Supreme Court later upheld the action of the Appellate Court. There the United States Supreme Court said at page 422 U. S.:

> "By the action of the Supreme Court of The State the judgment of the Court of Civil Appeals became the judgment of the highest court in the State to which the case could be taken. and hence the writ of error properly ran to that court. The constitutional question, although not raised theretofore, was distinctly presented in the petition to the Court of Civil Appeals for a rehearing, was considered by that court and decided adversely to the plaintiff in error. This court therefore has jurisdiction."

Counsel for Respondent contend that this case is governed by Edelman v. California (1952) 344 U. S. 357, 73 Sup. Ct. Rpt. 293,

97 L'ED 387. There is no similarity between the Edelman case and this case. In the first place Edelman was prosecuted in the Municipal Court for the violation of a California Statute which he claimed was unconstitutional under the Federal Constitution. The presence of the Federal question was therefore quite apparent at the time of the trial when Edelman was being prosecuted under what he claimed was an unconstitutional State Statute violative of the United States Constitution. There was no excuse for him not to have raised the Federal question at the time of his trial in the Municipal Court of Los Angeles. That, however, was not Edelman's chief difficulty according to the opinion of the United States Supreme Court cited supra. The court in its opinion pointed out and stressed the fact at page 359 of its opinion that Edelman's Attorney had allowed himself to become in default under the California law. The Supreme Court decision in the Edelman case called attention to the fact that under the authority of People v. Garza 86 Cal. App. 97; 260 P. 390, Rule 8, Rules on Appeal from Municipal Courts and Inferior Courts in Criminal Cases, as amended to January 6, 1947; Deering's Cal. Penal Code 1949 Sec. 1253 and People v. Sukovitzen 67 Cal. App. 2nd 901, 155 P. 2nd 406 the California Appellate Department of the Superior Court had the power and authority to affirm a judgment of conviction without a consideration of the merits where the Appellant failed to appear. The U.S. Supreme Court then decided that the Appeal of Edelman in the California State Court had been properly decided under the California Law upon the basis of his default. That being so no California Court had decided the constitutionality of the vagrancy statute under which he was prosecuted inasmuch as that question was presented for the first time on Appeal and had not been raised in the trial court. All that was decided by the

California courts, as pointed out in the U.S. Supreme Court decision, was that Edelman was in default under the California law and his Appeal therefore raising the sonstitutionality of the vagrancy statute in question need not be decided on its merits. The State Court had therefore not decided a Federal question. It has only decided that an Appellant was in default under the California law. The U. S. Supreme Court decision in the Edelman case also pointed out that he did not further urge any deprivation of a Federal Constitutional right in connection with his motion for relief from the default in the State Courts. The U. S. Supreme Court then went on to show that Edelman could still protect his constitutional rights by an application for a Writ of Habeas Corpus under the California law. None of those elements are present in the case at bar. The vast dissimilarity between the Edelman case and the case under consideration here is readily apparent. The Edelman case is in no wise controlling in this matter.

In his conclusion the emminent District Attorney from Contra Costa County brazenly goes beyond the record to first invade the realm of clair-voyancy and then descend to the regions of inaccuracy and untruth. In the first line of his conclusion he states "This case was decided by the California Courts on the basis of the petitioner's failure to comply with California Procedure." Such a conclusion would indeed require the exercise of occult powers for the California District Court of Appeals denied Petitioner's Petition for a Writ of Prohibition without opinion or comment. The California Supreme Court did likewise when Petitioner Petitioned for a Transfer and Hearing of the Cause. The District Attorney then charges Petitioner with seeking the hand pick his own Judges by filing Affidavits of Prejudice against any Judge who disagrees

with him. There are five Superior Court Judges in Contra Costa County. Three of these hear matters involving Petitioner whenever they come before them. There have been six out of county Judge's called in to hear Petitioner's matters within the last four years. Petitioner has filed an affidavit of bias and prejudice against only one of these, the present Respondent Judge. The statement that Petitioner files suits in pro per by the score is a reckless and vicious exaggeration. Opposing Counsel's expressed fear that Petitioner might summarily disqualify any trial judge who happens to rule against him is more worthy of a place in an old wives tale than in the pages of a brief before this Court. It certainly shows an utter lack of familiarity with the provisions of Sec. 170 (5) of the California Code of Civil Procedure. That section itself provides complete safeguards against any threat of disqualification of any Judge without good and sufficient grounds together with a full hearing to determine whether or not such grounds exist. Opposing Counsel knows full well that any challenged Judge need but file within five days time an affidavit under C.C.P. 170 (5) denying his bias and prejudice and he can thereafter receive complete exoneration, in a hearing presided over by another Judge selected by the Judicial Counsel, if the charges be unfounded. After exoneration he may proceed to try the case unblemished by any taint of bias and prejudice. There is under the California law a most adequate procedure to protect against the pretended and fabricated fears of opposing Counsel. Perhaps, however, Petitioner should not be too surprised at the learned District Attorney's invasion of the realm of fantasy. Such procedure is not at all a stranger to his usual methods. A few years ago this same District Attorney appearing before the Kefauver Committee which was then investigating suspected liasons between local enforcement officers and organized vice and crime

found himself compelled to explain the reason for nocturnal telephone calls to his home made by one "Big Bill" Pechart at that time a notorious California gambling overlord. The learned District Attorney explained those mysterious telephone calls coming between 12 midnight and 3 in the morning by pointing out that he and said "Big Bill" had for a number of years enjoyed a soul satisfying friendship of the purest spiritual nature entirely unrelated to mundane affairs and certainly entirely unconnected in any way with so low an occupation as gambling which was of course "Big Bill's" business. The impression sought to be conveyed to the Kefauver Committee was that "Big Bill" the notorious gambler called his dear friend the District Attorney at all hours of the night in order to solicitously inquire if he was sleeping well and enjoying good health these calls being motivated by the purest and most unselfish feelings of friendship and nothing else. The purveyor of such a tale could not very well be expected to stick to a record with its cold naked truth. The learned District Attorney next drags in the usual dollars and cents argument. He deplores the expense of bringing in Judges from outside Counties. His argument suggests the picture of a slow moving team of oxen wearily descending the slopes of the Sierras. As the matter of fact the last out of County Judge that was brought in to try one of Petitioner's cases was driven from Oakland by his Bailiff after he had finished his morning calendar. Petitioner's case a quiet title matter began at 2 p.m. and finished by 3:30 p.m. in time for the visiting Judge to returnto his chambers if he so desired. The entire distance travelled roundtrip was approximately 70 miles. If an allowance of 10¢ per mile travelling expense was granted plus $3.00 for lunch the entire expense involved would be $10.00. Would the learned District Attorney suggest that this sum was sufficiently

staggering to justify calling a halt to the processes of the administration of impartial justice. Furthermore the extra expense of calling an outside Judge is usually minimized by the counties involved by having one of the local Judges of Contra Costa County exchange places with the outside Judge for the time being. Whatever the facts may be the dollars and cents argument is indeed an unworthy one. The most precious possession that any American has is his right to the fair and impartial administration of justice by the courts of our land. It is there that he experiences at first hand the guarantees of our Federal Constitution. An argument in favor of the deprivation of such rights on a dollars and cents basis must indeed be repulsive to those who have spent a lifetime following protecting, and championing these fundamental rights guaranteed by an orderly government and enjoyed by a free people. The argument of the District Attorney of Contra Costa County in this respect is both inaccurate and unworthy. It is arguments such as these that invite the sceptical and unitiated to point to the law as a plaything of the rich. Petitioner would have preferred to have confined his remarks to the record as it appears before this court and the authorities which are pertinent to the facts of this case. When, however, an experienced practitioner learned in the law resorts to a patent and brazen attempt to disparage and discredit an ordinary citizen by a reckless departure from the confines of the record and even then does so untruthfully it would seem justifiable if the attacked citizen goes outside the record to inform the court as to the real truth involved. It is respectfully submitted that this case is not controlled by the principles of the Edelman case or any similar case and the Writ of Certiorari ought to be granted to inquir into Petitioner's Constitutional rights involved in this proceeding.

Eugene A Tabferro